No. 20-1738

In the Supreme Court of the United States

JANET L. YELLEN, SECRETARY OF THE TREASURY, ET AL., PETITIONERS

v.

UNITED STATES HOUSE OF REPRESENTATIVES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Respondent agrees that this case is moot. It also agrees that this Court's "established practice" when a case that otherwise would have warranted plenary review becomes moot is to "vacate the judgment below and remand with a direction to dismiss." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). And it agrees (Br. in Opp. 1) that this Court has "recently vacated" decisions in other cases because of mootness or changed circumstances resulting from a formal change in policy by the new Administration. See *Mayorkas* v. *Innovation Law Lab*, No. 19-1212 (June 21, 2021); *Biden* v. *Sierra Club*, No. 20-138 (July 2, 2021). Yet respondent urges the Court to take a different course here on the ground that the court of appeals' purportedly "careful" and "narrow" decision will not "prejudice" the government and would not have warranted plenary review. Br. in Opp. 1, 3-4.

Respondent, however, does not even attempt to defend the court of appeals' core reasoning—that the House has standing to challenge the Executive Branch's invocation of statutory authorities to transfer or reprioritize appropriated funds because "the Appropriations Clause requires two keys to unlock the Treasury, and the House holds one of those keys." Pet. App. 21a. Far from being narrow, that "two keys" rationale would logically allow a single House of Congress to embroil the Judiciary in a vast array of political disputes, as long as that House can plausibly allege that the Executive Branch has violated some legal provision whose enactment required its consent (*i.e.*, any statute). The "prejudice" to the government and to the public interest is in that fundamental reworking of the constitutional order. Respondent thus gets it exactly backward: that the court of appeals' holding on a structural constitutional issue is "unprecedented" (Br. in Opp. 1) is a reason for, not against, vacatur of its adventurous decision.

1. Respondent agrees (Br. in Opp. 9) that vacatur under *Munsingwear* is appropriate if, among other things, the case would have merited this Court's plenary review had it not become moot. See Stephen M. Shapiro et al., *Supreme Court Practice* § 19.4, at 19-29 n.34 (11th ed. 2019). That is the case here, see Pet. 16-30, and respondent's contrary arguments are unpersuasive.

a. As the government has explained (Pet. 17-18), the decision below would have merited plenary review because it conflicts with this Court's decision in *Virginia House of Delegates* v. *Bethune-Hill*, 139 S. Ct. 1945 (2019), which held that "a single House of a bicameral legislature lacks capacity to assert interests belonging to the legislature as a whole." *Id.* at 1953-1954.

Respondent attempts to distinguish *Bethune-Hill* on the ground that the "plain text of the Appropriations Clause" supposedly gives a single House of Congress the "right to veto spending by the Executive." Br. in Opp. 15; see *id.* at 11 ("The Appropriations Clause thus gives each chamber of Congress independent power to prevent federal expenditures."); *id.* at 17-18 (similar).

But the "plain text of the Appropriations Clause," Br. in Opp. 15, provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made *by Law*." U.S. Const. Art. I, § 9, Cl. 7 (emphasis added). A "Law" may be passed only by Congress as a whole, not by a single House. Accordingly, this Court has expressly recognized that the "straightforward and explicit command of the Appropriations Clause" is "'simply that no money can be paid out of the Treasury unless it has been appropriated by *an act of Congress*.'" *Office of Personnel Management* v. *Richmond*, 496 U.S. 414, 424 (1990) (emphasis added; citation omitted); see *Knote* v. *United States*, 95 U.S. 149, 154 (1877) (observing that the President's powers "cannot touch moneys in the treasury of the United States, except [as] expressly authorized by act of Congress").

The Appropriations Clause thus assigns the appropriations power to Congress as a whole, not to the House of Representatives or the Senate. At a minimum, the Clause does not "confer special powers on one House, independent of the other House" in "explicit, unambiguous terms." *INS* v. *Chadha*, 462 U.S. 919, 955 (1983). It follows that a single House "lacks capacity" to sue the Executive Branch for allegedly spending money beyond what has been appropriated because

such a suit would necessarily "assert interests belonging to [Congress] as a whole." *Bethune-Hill*, 139 S. Ct. at 1953-1954.

Like the court of appeals (see Pet. App. 11a), respondent attaches significance to the fact that the Appropriations Clause is phrased as "a prohibition on spending." Br. in Opp. 15. But that phrasing simply reflects the central purpose of the Clause to prevent an assertion by the Executive Branch of an inherent or unilateral power to spend money from the Treasury in the absence of a law authorizing the expenditures. *Id.* at 1-2, 15; see *Richmond*, 496 U.S. at 424-426. The President and the Department of Defense did not assert any inherent power to draw money from the Treasury to build a border wall. They instead relied on *statutory provisions* they interpreted to authorize the transfer or reprioritization of appropriated funds for that purpose. Respondent's characterization of this case as one in which Congress forbade appropriations for border-wall construction and the Executive Branch simply directed that funds be spent for that purpose anyway, without any law authorizing such expenditures, is thus incorrect.

Moreover, as the government has explained, many other constitutional provisions are framed as prohibitions, and a logical application of the court of appeals' reasoning would, for instance, "allow the Senate to maintain a federal suit alleging * * * that an executive agreement ought to have been submitted to the Senate as a treaty." Pet. 22; see Pet. 21-22 (listing other examples). Respondent offers no answer to that concern. Nor does respondent have an answer—other than to express "puzzl[ement]," Br. in Opp. 13—to the government's point (Pet. 22-23) that virtually any claim that the Executive Branch has exceeded its statutory

authority could be recast as an Appropriations Clause claim. Virtually all Executive Branch actions cost money, and a single House seeking to challenge such an action could simply assert that the applicable appropriations laws do not permit the expenditure of funds for the allegedly unauthorized purpose.

Critically, respondent does not even attempt to defend the court of appeals' reasoning that the House has standing because "the Appropriations Clause requires two keys to unlock the Treasury, and the House holds one of those keys." Pet. App. 21a. As the government has explained (Pet. 20), that is true of *every* statute in our bicameral system. The court of appeals' rationale would thus permit a single House to sue the Executive Branch in federal court in the District of Columbia whenever it believes that the Executive Branch has violated any legal provision whose enactment required that House's consent. See Pet. 18-22. Even respondent recognizes (Br. in Opp. 14) that such an outcome would be untenable, and repeatedly insists that the lower court's decision is "narrow" (*id.* at 1, 3, 9, 20, 26), "careful" (*id.* at 3, 4, 10), "limited" (*id.* at 1, 2, 4, 10, 23), and "cabined" (*id.* at 10). Yet respondent does not actually explain how that outcome could be avoided under a faithful application of the court's "two keys" rationale.

b. The government has explained (Pet. 23-28) that the court of appeals' decision also conflicts with this Court's decision in *Raines* v. *Byrd*, 521 U.S. 811 (1997), which held that individual Members of Congress did not have standing to challenge the constitutionality of the Line Item Veto Act because the "dilution of institutional legislative power" that the statute allegedly effected was not a "personal, particularized, concrete, [or] otherwise judicially cognizable" injury sufficient to satisfy

Article III. *Id.* at 820, 826. Respondent suggests that *Raines* is inapposite because the plaintiff in this case is a "legislative institution[]," not an "individual legislator[]." Br. in Opp. 16 (citation omitted). But respondent identifies nothing in *Raines* to suggest that the Court's holding turned on that distinction. Rather, *Raines* relied on the nature of the injury being asserted—and like the injury there, respondent's asserted injury is merely an alleged "dilution" of its "power" concerning appropriations. 521 U.S. at 826. Indeed, as the government has explained (Pet. 28-30), the court of appeals' recognition of that alleged injury conflicts with the foundational Article III principle that "the alleged violation of a right to have the Government act in accordance with law [is] not judicially cognizable." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 575 (1992); see *Hollingsworth* v. *Perry*, 570 U.S. 693, 706 (2013).

Raines also emphasized the lack of "historical practice" supporting the legislators' suit and the existence of an "adequate remedy" in the legislative and political process, both of which counseled against the Judiciary's wading into the dispute. 521 U.S. at 826, 829. Respondent does not contest "the absence of historical analogies for the House's claim" in this case, Br. in Opp. 16, and its only objection to reliance on the legislative and political process is that it allegedly tried that course and failed, *id.* at 17. But *Raines* never suggested that a plaintiff's Article III standing depends on whether that alternative mechanism would prove successful. To the contrary, the Court found the possibility of "repeal[ing] the Act" to be "an adequate remedy" even when the plaintiffs constituted only a small minority of Members. 521 U.S. at 829.

c. Finally, the government has explained (Pet. 29-30) that the decision below raises an issue of exceptional importance because, if left in place, it could "entangle the Judiciary in fundamentally political disputes." Pet. 29. Respondent calls that assertion "theatrical," Br. in Opp. 20, but does not explain how the decision below logically could be cabined. See pp. 4-5, *supra*. Indeed, respondent specifically defends the court of appeals' decision to entangle itself in *this* political dispute by asserting that "the House is empowered to seek a judicial remedy" precisely because its political and legislative efforts had failed. Br. in Opp. 17. But such failure is hardly unusual in conflicts between the Executive and Legislative Branches. Respondent cites no authority to support expanding Article III jurisdiction to insert the Judicial Branch into the process simply because the political Branches have reached an impasse. Cf. *Trump* v. *Mazars USA, LLP*, 140 S. Ct. 2019, 2034 (2020).

To the contrary, expanding Article III to allow the House to sue in such situations would risk "damaging the public confidence that is vital to the functioning of the Judicial Branch, by embroiling the federal courts in a power contest nearly at the height of its political tension" and raising the "specter of judicial readiness to enlist on one side of a political tug-of-war." *Raines*, 521 U.S. at 833-834 (Souter, J., concurring in the judgment) (citation omitted). That would not be true of cases involving private plaintiffs. Respondent thus errs in suggesting (Br. in Opp. 21) that "judicial review at the behest of a single chamber of Congress" poses no unique dangers beyond those present when "private parties * * * bring such challenges."

To the extent respondent suggests (Br. in Opp. 2, 3, 9-10) that the decision below would not have merited

further review because it is "interlocutory," that suggestion is incorrect. The district court's order dismissing the complaint for lack of Article III standing was itself final, and Article III standing was the sole basis for the court of appeals' reversal—making this case (had it not become moot) an ideal vehicle for addressing Article III standing. Indeed, the Court often addresses standing questions in that posture. *E.g.*, *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1544 (2016); *Clapper* v. *Amnesty International USA*, 568 U.S. 398, 407 (2013); *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 469-470 (1982). Just as the "interlocutory" posture did not pose a barrier to plenary review in those cases, it would not have done so here.

2. Because the decision below would have warranted plenary review but for its mootness, this Court should follow its "established practice" and vacate the judgment below. *Munsingwear*, 340 U.S. at 39. As the government has explained (Pet. 30-33), the equities favor vacatur here. See *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 29 (1994) (explaining that the vacatur determination ultimately "is an equitable one"). This is not a case in which the government has acted to frustrate further review. And it would not serve justice or the public interest to force the Executive Branch to choose between, on the one hand, continuing border-wall construction that it has concluded is not in the public interest just to keep this case from becoming moot, and, on the other hand, acquiescing to a precedential judicial decision that goes to the core of the separation of powers, that the Executive Branch submits is contrary to its constitutional prerogatives, and that is harmful to the public interest as a whole.

Citing this Court's decision in *U.S. Bancorp*, *supra*, respondent suggests (Br. in Opp. 27-28) that "this Court has expressly reserved the question whether *Munsingwear* vacatur is appropriate where the Executive Branch has mooted a case." But *U.S. Bancorp* did not address a situation in which the Executive Branch had made a formal policy determination following a change in Administration to terminate the program whose legality was being challenged. Moreover, in recent months this Court has granted vacatur because of mootness or changed circumstances resulting from precisely such determinations, see *Mayorkas* v. *Innovation Law Lab*, No. 19-1212 (June 21, 2021)—including in a case involving materially identical challenges to the funding of border-wall construction, see *Biden* v. *Sierra Club*, No. 20-138 (July 2, 2021). The same result is warranted here.

Respondent contends (Br. in Opp. 22-23; cf. *id.* at 1-3, 20-26) that those recent decisions are distinguishable because the government was prejudiced by the adverse merits rulings there, but it would not be prejudiced by the Article III standing decision here. See *id.* at 25 (suggesting that the government's "being subject to suit by" a single House "is fundamentally different from being subject to restrictions on primary conduct"). That contention is incorrect. Although the decision below did not reach "an adjudication on the merits," *id.* at 23, the court of appeals' holding that a single House has Article III standing to sue the Executive Branch for alleged Appropriations Clause violations would embroil the Judiciary in fundamentally political disputes and place the Executive under the constant shadow of the prospect of such litigation. See pp. 4-5, 7, *supra*. That threat to the constitutional order would prejudice the government and harm the public interest—and do so in

systemic ways transcending any particular policy or program. See *Raines*, 521 U.S. at 833-834 (Souter, J., concurring in the judgment).

Respondent attempts to minimize those harms by emphasizing (Br. in Opp. 23-24) the assertedly "unique facts that led to this suit" and the "unprecedented" nature of this dispute. In respondent's telling, this case involves an "unprecedented expenditure of funds in defiance of a clear refusal by the House to authorize additional expenditures." *Id.* at 24. But respondent overlooks that, in 2014, it filed suit alleging that the Department of Health and Human Services had "'usurped [the House's] Article I legislative authority'" by reimbursing health insurers in ways that respondent contended resulted in the expenditure of "billions of unappropriated dollars to support the Patient Protection and Affordable Care Act." *United States House of Representatives* v. *Burwell*, 130 F. Supp. 3d 53, 57, 63 (D.D.C. 2015) (brackets and citation omitted). There, too, respondent alleged that the Executive Branch had expended the funds "*after* [it] formally asked Congress" for a specific appropriation and "*after* Congress rejected [its] appropriations request." D. Ct. Doc. 53, at 22, *United States House of Representatives* v. *Burwell*, No. 14-cv-1967 (D.D.C. Dec. 2, 2015). The district court in that case held that the House had standing to seek a remedy for that alleged Appropriations Clause violation. See 130 F. Supp. 3d at 71-75. But the parties later negotiated a settlement, the D.C. Circuit dismissed the government's appeal, and the district court, consistent with the parties' agreement, vacated its injunction barring reimbursements to insurers. See *United States House of Representatives* v. *Azar*, No. 14-cv-1967, 2018 WL 8576647, at *1 (D.D.C. May 18, 2018).

In any event, that this case is the first appellate decision to address the standing of one House of Congress to challenge the Executive Branch's actions under the Appropriations Clause is a reason for, not against, vacatur. It would be fundamentally inequitable to allow a novel appellate decision on an issue of critical constitutional importance to remain in place when mootness results from a change in policy following an election. See *Munsingwear*, 340 U.S. at 40. Vacatur "is commonly utilized in precisely this situation to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *Id.* at 41. That is all the more important when, as here, the judgment is the first appellate decision of its kind, raises significant constitutional concerns, and would govern all federal cases in the District of Columbia, where any such case could be brought.

* * * * *

The Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand with instructions to dismiss the case as moot under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

Respectfully submitted.

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